

**UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
SAN FRANCISCO BRANCH OFFICE
DIVISION OF JUDGES**

PROVIDENCE HEALTH SYSTEM – SOUTHERN
CALIFORNIA, d/b/a HOLY CROSS MEDICAL CENTER

and

Case 31–CA–26230

HEALTH CARE EMPLOYEES UNION, LOCAL 399,
SERVICE EMPLOYEES INTERNATIONAL UNION,
AFL–CIO

Rodolfo L. Fong-Sandoval, Atty.

Los Angeles, California, for the General Counsel

Melissa Peri Lopez, Atty.

of Sheppard Mullin Richter & Hampton, LLP,
Los Angeles, California for Respondent

Monica T. Guizar, Atty.,

of Weinberg, Roger & Rosenfeld,
Los Angeles, California for the Charging Party

DECISION

Statement of the Case

WILLIAM L. SCHMIDT, Administrative Law Judge. The sole issue presented in this case is whether Providence Health System–Southern California, d/b/a Holy Cross Medical Center (Respondent or Holy Cross) terminated its employee Fernando Medina in violation of Section 8(a)(1) and (3) of the National Labor Relations Act (Act). Health Care Employees Union, Local 399, Service Employees International Union, AFL–CIO (Union) commenced this proceeding on April 14, 2003,¹ by filing an unfair labor practice charge with Region 31 of the National Labor Relations Board (Board) alleging that Respondent unlawfully terminated Medina. After investigating that charge, the Regional Director for Region 31 issued a formal complaint concerning Medina’s termination on July 29. Respondent filed a timely answer denying that it engaged in the unfair labor practice alleged.

I heard this case in Los Angeles, California, on September 9, 10 and 11. After reviewing the entire record,² resolving where necessary credibility issues on the basis of a variety of

¹ Unless otherwise noted, all further dates refer to the 2003 calendar year.

² The transcript (T.) contains numerous self-evident errors. Hence, I note only the following specific corrections. First, Irma del Rio’s name as used in this decision conforms to her cursive signature on Respondent’s Exhibits 18 and 19. Second, “love,” used twice at T. 130:5, should read “lost.” Third, “Ms. Guizar” at T. 221:17, 420:1, 423: 2 and 4, and 426:12 should read “Ms. Lopez.” Finally, “Judge Schlesinger” at T. 262:20 should read “Judge Schmidt.”

factors, including the demeanor of the witnesses,³ and after considering the General Counsel's oral argument at the close of the hearing and the post-hearing brief filed by Respondent, I have concluded that Respondent did not violate the Act based on the following

5 Findings of Fact

I. Jurisdiction

10 The Respondent, a California corporation with a place of business in Mission Hills, California, is engaged in the business of providing health care services as a hospital. During the 12-month period preceding issuance of the complaint, Respondent, in conducting its business operations, derived gross revenues in excess of \$250,000 and purchased and received goods and services valued in excess of \$50,000 directly from points outside the State of California. The Respondent admits and I find that it is an employer engaged in commerce 15 within the meaning of Section 2(2), (6), and (7) of the Act and that the Union is a labor organization within the meaning of Section 2(5) of the Act.

II. Alleged Unfair Labor Practices

20 A. Relevant Facts

Fernando Medina worked at Holy Cross as a housekeeper (aka Environmental Tech II) in the Environmental Services Department (EVS department). EVS department employees perform janitorial functions throughout the hospital. The department operates three daily shifts: 25 one lasts from 7 a.m. to 3:30 p.m. (the AM shift), another lasts from 3:30 p.m. to 12 midnight (the PM shift), and the other lasts from 11 p.m. to 7:30 a.m. (the graveyard shift). Medina worked the PM shift or shift two as shown on the Respondent's timecards. His specific duties included sweeping, mopping, removing trash and general cleaning in the kitchen, lab, autopsy room, mortuary room, purchasing office and basement bathrooms.

30 Altogether, Medina worked at the hospital for a little more than 13 years. His tenure was broken into two segments. Originally hired in 1982, Medina left in about 1985 and then returned to the hospital in December 1993. Although his supervisor rated him as a worker who "meets expectations" in his 2002 and 2001 performance reviews, his performance reviews for the 35 previous two years show that he failed to meet hospital expectations. In addition, he has received two or three disciplinary notices in recent years relating to absenteeism and insubordination. His immediate superior, PM supervisor Joaquin Ramirez, asserted that Medina occasionally had difficulty accepting supervision from others. In fact, during one period about a year before his termination, Anthony Rodgers, the EVS department manager, put Medina on a 40 90-day performance plan that, in essence, provided him a last chance to improve his attitude toward supervisors.

Ramirez and Irma del Rio, the AM shift supervisor, both reported directly to Rodgers until he left Holy Cross in October 2002. Rodgers, in turn, reported to the hospital's Plant 45 Operations Director, Ray Brink. By the time of the hearing, the hospital had not permanently replaced Rodgers. Instead, del Rio received a promotion to the position of lead supervisor

50 ³ My findings reflect credibility resolutions using, in the main, those factors summarized by Judge Medina in *U.S. v. Foster*, 9 F.R.D. 367, 388-390 (1949). In making these findings, I have considered all of the testimony and documentary evidence. I do not credit testimony inconsistent with my findings. Added discussions about credibility appear below.

following Rodgers' departure. In this new capacity, she performed several of the duties formerly performed by Rodgers including the supervision of the lead housekeepers, the department employees who have the added duty of reporting problems to the shift supervisor.

5 After she became the lead supervisor, del Rio received complaints from the hospital's kitchen manager about the poor quality of Medina's housekeeping work in preparation for one of the kitchen's periodic inspections. Ms. del Rio spoke with Medina about the complaints and urged him to be more thorough in his cleaning, particularly at inspection time. Apart from this matter, del Rio encountered no other difficulties with Medina's performance until the events that
10 led to his employment separation described later.

Purportedly, the Union began an organizing campaign at Holy Cross in September or October 2002. Medina received authorization cards, and a lanyard bearing the Union's initials and a slogan from Union organizer Arturo Castellanos. Medina talked to his coworkers about
15 the Union during his breaks in the cafeteria and distributed authorization cards to them. He attended meetings held by the Union and openly fraternized with Castellanos and other union agents when they distributed literature in the vicinity of the hospital's service entrance used by many employees arriving and leaving work. Medina claimed that in the months before his termination, he frequently carried authorization cards in his uniform shirt pocket at work
20 positioned to make the distinctive yellow and purple colors of the card visible. He claims further that he wore the Union lanyard at work almost all the time. Manuel Bravo, another housekeeping employee who also actively campaigned for the Union, confirmed that Medina wore the Union lanyard and carried authorization cards visibly while at work. According to Bravo, no union supporter other than Bravo carried the union cards so openly but some of the
25 nurses' assistants often wore the union lanyards.

At some point, the Holy Cross management became aware of the Union's activities as they began holding captive audience meetings in October 2002 to address the Union's organizing campaign.⁴ At those meetings, management distributed various anti-union
30 documents. However, all of the managers, supervisors and lead persons who testified claimed they knew nothing of Medina's union activities or sympathies. Medina, on the other hand, asserts that Brink, del Rio and Raul Navarro all saw him carrying the union cards in his pocket and gestured their displeasure in varying degrees.

35 Specifically, Medina claimed that del Rio walked by one day in November as Castellanos handed him some authorization cards. Medina then followed del Rio to the EVS office where del Rio sat down to work at her computer. When Medina approached nearby to sign-in on his timecard, del Rio stared at the cards in his pocket, shook her head "no," and said "No good." On another occasion, Medina went to the Human Resources Department to pick up some trash and cardboard. Navarro saw him on this occasion with the cards in his pocket. Navarro did not
40 say anything about the cards but he shook his head and gave Medina directions with a harsh tone of voice. Brink saw Medina twice carrying union cards in his shirt pocket. The first occasion occurred as Brink stood passing out Christmas cookies to employees near the EVS office. When Medina approached for a cookie, Brink stared at Medina's shirt pocket and then
45 handed him a cookie in a gruff manner. Later, Brink hosted an employee dinner adjacent to the Plant Operations office which Medina attended wearing his uniform shirt with union cards

50 ⁴ The record is not altogether clear as to whether these meetings began because of union organizing at Respondent's facility or the organizing carried on at St. Joseph's Hospital, a related institution located in Burbank, California.

protruding from the breast pocket. When Brink saw Medina, he put on his glasses, stared at the cards and shook his head.

Both del Rio and Navarro credibly denied that they observed Medina with the Union's cards or lanyard. Brink did not testify.⁵ In addition, Ramirez, Medina's immediate supervisor, never observed Medina carrying authorization cards or wearing the lanyard. In fact, Ramirez never knew that Medina sympathized with the union organizing campaign.

The events leading to Medina's termination began on Friday, January 24. Medina worked his usual PM shift that day. Near the end of the shift, Jose Hernandez, a lead housekeeper then serving as a vacation substitute for PM shift supervisor Ramirez, asked if Medina would volunteer to continue working through the graveyard shift because the regularly scheduled employee on that shift had called in sick. Medina agreed and worked until 730 a.m., Saturday, January 25.

Medina claimed that during the graveyard shift he "covered Emergency, [and the] basement." He further claimed that he was twice paged to bring linens to particular rooms and that around 4:00 a.m., he "went back over the emergency area again" to take out the trash and soiled linens. He also said that he mopped up the trauma room floor which was covered with blood. Before leaving the hospital that morning, Medina returned the "beeper" carried by the graveyard shift employee to Roberto Gutierrez, the lead housekeeper on that Saturday's AM shift. By doing so, Medina identified himself to Gutierrez as the employee who had worked the graveyard shift.

Later that morning, two AM shift housekeepers told Gutierrez that they had to perform certain tasks left undone on the graveyard shift. Thus, Maria Delgado reported that the trash and soiled linen in the Emergency Room had not been removed and that the graveyard shift worker had not cleaned the public restrooms adjacent to the Emergency Room. Leo Perez told Gutierrez that a nurse complained to him because the graveyard shift housekeeper failed to clean a patient's room as requested. Purportedly, the nurse told Perez that the graveyard shift worker declined her request to mop the floor in the patient's room claiming that he did not have a mop. As a result, Perez cleaned the patient's room after he reported to work.⁶

On Monday, January 27, Gutierrez provided supervisor del Rio with the reports he had received from Delgado and Perez the previous Saturday. That afternoon del Rio briefly confronted Medina. She told him "that there were many problems" with his work on the graveyard shift. He responded by saying that he had done his work.⁷ Nothing further was said at that time. Over the next few days, del Rio followed up on the reports by speaking directly to

⁵ Respondent sought to have Brink, who is now retired, testify by telephone because he lives a considerable distance from Los Angeles and suffers from a serious illness. As General Counsel and Charging Party objected to his testimony by telephone, I rejected Respondent's request. *Westside Painting, Inc.* 238 NLRB 796 (1999). However, in light of the explanation provided, I have made no adverse inferences based on Brink's failure to testify.

⁶ Delgado testified; Perez did not. Delgado supported Gutierrez' report to del Rio with a minor exception. Gutierrez claimed that Delgado initiated the report without any inquiry on his part. Delgado claims that she told Gutierrez about the Emergency Room conditions by way of explaining to him why she had fallen behind with her normal work.

⁷ This finding is based on Medina's testimony initially which I credit. Subsequently, he denied that anyone spoke to him on Monday, January 27 about the quality of his work on the graveyard shift.

Delgado and the nurse who asked to have a patient's room cleaned. Both Delgado and the nurse confirmed the reports originally provided to del Rio by Gutierrez. In addition, del Rio learned from the nurse that the graveyard shift housekeeper had not delivered clean linen as she requested.

Ms. del Rio next consulted with Navarro, the hospital's Employee Relations Manager. Ms del Rio described the complaints about Medina's work and discussed his past difficulties in following supervisory instructions. When she proposed to give Medina a documented verbal warning⁸ because of these new complaints, Navarro agreed.

Around 5 p.m. on Friday, January 31, Del Rio instructed Hernandez, still substituting for the vacationing PM shift supervisor, to bring Medina to the EVS office. Hernandez summoned Medina and remained in the office while Del Rio spoke to Medina. At that time, Del Rio informed Medina that she had received complaints about his work on the January 25 graveyard shift and began to detail the complaints she had listed in a Counseling Memo form. Medina soon became upset, accused the nurses who had complained about his work of lying, and demanded that Del Rio provide their names which she refused to do. Medina then told Del Rio that, rather than criticizing his work, she should have thanked him for volunteering to work a double shift when the scheduled worker called in sick. Medina admitted telling del Rio that he would not sign anything that was not true. By that point Medina claims that he had become "very stressed" and felt "very bad" so he told del Rio he was leaving work, and as he was not scheduled to work the following two days, Saturday and Sunday, he would return on Monday, February 3. According to Medina's testimony at the hearing, he left the January 31 meeting without a peep from del Rio or Hernandez about his sudden departure only two or so hours into his work shift.

Ms. del Rio disputes significant parts of Medina's account. She claims that Medina became very agitated when she began to describe the complaints that had been lodged about his work on the graveyard shift and stated that he would rather resign than sign the written list of complaints del Rio had prepared for the meeting. When Medina then got up to leave, del Rio asserted that she asked him for his identification badge, housekeeping keys, and uniforms. Medina told her that he would have to go to his van out in the parking lot first and then he left.

Although Hernandez did not hear Medina use the word "resign," he felt Medina did so by his actions. Hernandez recalled that Medina stated: "I won't come back to work here anymore because I'm not being treated in a fair way." Medina, according to Hernandez, became very agitated, stood up with his badge in his hand as though he was about to throw it, and walked out of the office. Hernandez followed, calling to Medina twice to return but Medina ignored these pleas. To Hernandez it appeared that Medina wanted to "throw" his job away because "he didn't want to accept what people were trying to correct."⁹ Both del Rio and Hernandez deny that Medina said anything to the effect that he felt sick, that he needed to leave work, or that he planned to return the following Monday when he walked out of the counseling session.

Contrary to his hearing testimony, Medina's pre-hearing affidavit provided to the General Counsel states:

⁸ According to Navarro, a documented verbal warning remains in the disciplining department's records. By contrast, written warnings are sent to the Human Resources Department where they are placed in the employee's master personnel file.

⁹ The finding in this sentence is based on testimony counsel for the General Counsel elicited on cross-examination.

Del Rio continued insisting that I had to sign the warning, and after she continued insisting, I told her that I needed to leave and go home, because I was feeling terrible, as a result of the false accusations she was making. **Del Rio told me that I should not go home**, and I told her that I was feeling very badly, and that I had to go home, because I could not take the emotional distress caused by her statements. [Emphasis mine]

On the basis of this admission in Medina's pre-hearing affidavit and Hernandez' credible testimony that he pleaded with Medina to return when he walked out of the EVS office, I find that no manager or supervisor authorized Medina's early departure from work on January 31 particularly in the midst of a disciplinary session.

On his way out of the building Medina spoke briefly at the service entrance/exit with Ledy Torres, a jewelry vendor and a former hospital kitchen employee who had business with Medina. Torres recalled that Medina stated to her that Irma [del Rio] had just accused him of too much and that she wanted to get him out because he was in the union. According to Torres, Medina said nothing about resigning.¹⁰ Regardless, Medina left the hospital after his brief exchange with Torres, having put in about two and one-half hours of his scheduled eight-hour shift. He did not return until his next scheduled shift on February 3.

Hernandez returned to the office where, at del Rio's request, he prepared a written statement providing his account of what had occurred during the meeting. Hernandez wrote that Medina "got very nervous and said that it was better if he resigned because he was not being treated in a fair manner." At some point, Ms. del Rio also prepared her own written account of the meeting.¹¹ In her written account, del Rio stated that Medina accused her of being unfair and that he became "very upset and said that [he would] rather resign than sign a warning [that] was going to be in his records." Her statement also avers that when she asked Medina for his badge, uniforms and keys, he told her that he would return after getting his van out of the parking lot.

On Monday morning, February 3, del Rio prepared the hospital's standard Employee Profile Form reflecting the termination of Medina's employment by means of a voluntary

¹⁰ General Counsel claims that Medina's remarks to Ms. Torres immediately after leaving the office should be admissible under §803(2) of the Federal Rules of Evidence. In support, the General Counsel cites the ALJ's holding in *Lauderdale Lakes General Hospital*, 227 NLRB 1412, 1418 fn. 6. I reject that claim. The cited case is factually distinguishable. Medina's perception about Del Rio's anti-union motives at that time lacks any credible support. In addition, I find that a routine employee counseling session such as occurred here does not amount to the type of "startling event or condition" required as a precondition of admissibility under FRE §802(2). Finally, to the extent that the General Counsel seeks to rely on Torres' claim that Medina said nothing about resigning at that time, I find that the cited evidentiary rule does not apply to excited non-utterances. As Respondent objected to this hearsay testimony, I do not rely on the truth of the matters asserted in Medina's purported statements at that time in reaching my conclusions about this case.

¹¹ Although del Rio's statement bears the date "01-31-2003," I seriously doubt that she prepared it immediately after the blow-up in the office. Thus, she concludes the statement with a parenthetical notation that Medina never returned. She would not have known that he did not return until much later inasmuch as Medina's shift did not end until approximately midnight and del Rio normally left around 5 p.m.

resignation. Ms. del Rio took the profile form, with the Counseling Memo she had prepared regarding the graveyard shift complaints, and both her and Hernandez' written accounts of the January 31 meeting to Ray Brink, Director of Plant Operations, for his signature. After Brink signed the profile form, del Rio took the documents to Raul Navarro in the Human Resources Department for further processing.

That afternoon, Medina returned to work. Shortly after his shift began, del Rio saw Medina working. She went to the PM shift supervisor who had returned from his vacation that day unaware of the events which occurred on the previous Friday. Ms. del Rio told Ramirez that Medina had resigned the previous Friday and that he should not be permitted to continue working. Ramirez went to Medina and told him that he had to leave work. Ramirez advised Medina to speak with someone in the Human Resources Department to provide his explanation about what had occurred the previous week. Medina left immediately for the Human Resources Department where he spoke with Navarro.

Medina told Navarro that he had not resigned and that he wanted his job back. Navarro explained that he had already accepted Medina's resignation, but that he would verify what had transpired leading up to his termination. Navarro asked Medina to return the next day, Tuesday, February 4. Following his conference with Medina, Navarro attempted unsuccessfully to reach Brink in the Plant Operations Department. However, Navarro then left a voice message for Brink, asking if he could confirm that Medina had resigned and that his resignation had been accepted. On Tuesday, Brink called Navarro back to report that he had met with del Rio and their decision to accept Medina's resignation remained unchanged. When Medina came to Navarro's office that afternoon, Navarro told him that he had reviewed the matter and would not change the decision that had been made to accept his resignation. Navarro asked for Medina's keys, identification badge, and uniforms. Navarro also arranged for Medina to receive his final paychecks.

Following his separation, Medina filed a claim for unemployment benefits. "Quit" appears in the space provided to explain the reason for separation. Medina claimed that his son who assisted him in filing his claim for unemployment benefits, erroneously made that entry. Subsequently, however, Medina received unemployment benefits following an appeal hearing at which no hospital representative appeared.

B. Analysis and Arguments

In all Section 8(a)(3) cases that turn on employer motivation, the General Counsel must, under *Wright Line*, 251 NLRB 1083, 1089 (1980), establish union activity or sympathies as a motivating factor in the employer's decision to take adverse action against an employee. This means that the General Counsel must show that the employee's protected conduct was, *in fact*, a motivating factor in Respondent's decision. *Webco Industries*, 334 NLRB 608, fn 3 (2001); *Manno Electric*, 321 NLRB 278, 280-281 (1996). To prove the elements commonly required to support a showing of discriminatory motivation, the General Counsel must show: (1) that the employee engaged in protected activity; (2) that the employer knew about the employee's protected activity; and (3) that the employer's hostility toward the employee's activity caused or led to the adverse action at issue. *Best Plumbing Supply*, 310 NLRB 143 (1993).

If the General Counsel establishes that the employee's protected activity as a motivating factor in the employer's decision, the burden of persuasion then shifts to the employer to establish, as an affirmative defense, that it would have taken the same action even if the employee had not engaged in the protected conduct. *Id.* Because the employer bears the burden of persuasion, not merely production, *Transportation Management Corp.*, 462 U.S. 393,

403 (1983), it cannot simply recite a legitimate reason for the adverse action but must “persuade by a preponderance of the evidence that the same action would have taken place even in the absence of the protected conduct.” *Roure Bertrand Dupont, Inc.*, 271 NLRB 443 (1984).

5 Counsel for the General Counsel contends that all elements to establish a discriminatory motive for Medina’s termination have been proven here. I do not agree. The causal connection between Medina’s hostile response to the modest criticism of his work on the graveyard shift and his employment separation appears unassailable to me. Even assuming, that Medina engaged in some protected activity which may have come to the attention of the hospital’s
10 managers and supervisors, the General Counsel’s evidence that they harbored any unusual hostility toward his activity is, at the very best, extremely weak. The hospital’s campaign against the organizing effort shows little else other than the fact that it opposed unionization. Certainly, the campaign materials contribute nothing toward a showing that the hospital harbored animus focused at Medina or his protected activity. Apart from Medina’s self-serving statements about
15 stares by Brink and Navarro, and a brief comment (“No good”) by del Rio that I do not credit, the record suggests that the hospital authorities did nothing to interfere with Medina’s purported activities. General Counsel’s claim that del Rio commenced harassing Medina after she learned of his union sympathies is supported only by Medina’s vivid imagination. By December, when his supervisors and managers presumably knew of his pro-union sympathies, Medina received
20 the most positive evaluation he received in years along with a six-percent merit wage increase.

Respondent’s explanation for the action taken may be assessed in determining if the General Counsel has established a prima facie case. *Holo-Krome Co. v. NLRB*, 954 F.2d 108, 113 (2d Cir. 1992). I find it unnecessary to play a word-game as to whether Medina resigned or
25 whether Respondent terminated him. Regardless of the characterization chosen, Respondent provided a legitimate explanation for Medina’s separation. One week after receiving several complaints involving his work on the January 26 graveyard shift, del Rio attempted to discuss those complaints with him. Medina, who had been previously disciplined for insubordinate conduct, became so agitated by del Rio’s criticism of his work that he walked out in the middle
30 of the counseling session and left work about six-hours before the end of his shift. I find Medina’s conduct toward del Rio on January 31 amounts to gross insubordination and that it provides a very legitimate basis for his subsequent termination.

In my judgment, Respondent’s credible explanation for Medina’s termination and the
35 timing of that action precludes a finding that the General Counsel established a prima facie case. Overall, the causal connection between Medina’s insubordinate conduct on January 31 and his employment separation is extremely strong. While the absence of a legitimate basis for an employer’s action may form part of the General Counsel’s *Wright Line* case, the converse is also true: the presence of a compelling and legitimate explanation for the action may negate the
40 General Counsel’s case. *NLRB v. CWI of Maryland, Inc.*, 127 F.3d 319, 332 (4th Cir. 1997). Here, the General Counsel’s case suffers from the fact that Respondent promptly terminated Medina for a serious offense. Virtually no evidence contradicts the justifiable reason Respondent provided for Medina’s termination. *Id.* at 333.

45 Instead, the evidence shows that lead supervisor del Rio investigated the shoddy-work reports she received and undertook reasonable, corrective steps. Throughout the hearing counsel for the General Counsel chose to question del Rio’s authority to discipline Medina at all because she had historically supervised a different shift. Entirely apart from the fact that Respondent credibly established that del Rio had been promoted to the lead supervisor
50 position, the evidence shows that Ramirez, Medina’s supervisor, was on vacation at the time this misconduct occurred. This inquiry also ignored the obvious fact that del Rio dutifully obtained mandatory authorizations from Plant Operations Director Brink and Employee

Relations Manager Navarro to effectuate Medina's separation. These wasteful, time-consuming inquiries about del Rio's authority detracted considerably from the General Counsel's case.

Accordingly, for reasons detailed above, I find that the General Counsel has failed to present a persuasive case for concluding or inferring that Medina's termination resulted from an anti-union motive that Respondent secretly harbored. Instead, I find that Respondent terminated Medina for just cause unrelated to his Union activities or sympathies. Accordingly, I will recommend that the complaint be dismissed.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended¹²

ORDER

The complaint is dismissed.

Dated: December 12, 2003, at San Francisco, CA.

Administrative Law Judge

¹² If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.